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EKA Noodle Bhd v Norhayati bt Tukiman

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-282–06 OF 2021
LIZA CHAN JC
21 AUGUST 2021

C *Companies and Corporations — Meetings — Extraordinary general meeting ('EGM') — Whether EGM notice valid — Whether notice must attach written consent and declaration of proposed new directors — Whether proposed resolution to remove company secretary was valid — Whether notice was valid despite having fixed date and venue of EGM — Whether the notice was in breach of s 196 of the Companies Act 2016 — Whether the procedure for calling the meeting had been adhered to — Companies Act 2016 s 311(3)(a)*

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The plaintiff was a public listed company, listed on the main board of Bursa Malaysia Securities Bhd ('Bursa Malaysia'). On 31 May 2021, the plaintiff's company secretary received an extraordinary general meeting ('EGM') notice ('the third EGM notice') pursuant to s 311(3)(a) of the Companies Act 2016 ('the CA 2016'), requesting an EGM to be held on 29 June 2021 to remove the current directors and to appoint new directors. The plaintiff filed an originating summons ('OS') in encl 1 and sought, inter alia, declarations to invalidate the third EGM notice and to invalidate the holding of the EGM. The plaintiff's arguments to invalidate the notice were that: (a) the third EGM notice was brought by only a single member of the company whilst s 311(3)(a) of the CA 2016 expressly uses the word 'members'; (b) the third EGM notice did not contain or attach any written consent of the proposed new directors; (c) the defendant did not have the power to request the removal of the company secretary as that power resided with the board of directors; (d) s 311(2) of the CA 2016 read with s 312(1) of the CA 2016 did not allow the defendant to fix the date and venue of the general meeting; and (e) the removal of all the plaintiff's directors breached the CA 2016 where a public listed company must have a minimum of two directors. The sole issue for determination by the court centred on s 311(3)(a) of the CA 2016 and whether a single shareholder, holding at least 10% of the shareholding in the plaintiff company could validly requisition an EGM.

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Held, dismissing the originating summons with costs.

(1) The plaintiff's contention that by the use of the word 'members'; plurality must have been the intention of Parliament in regard to s 311(3)(a) of the CA 2016 was rejected by the court. One of the key

changes in the CA 2016 allows the incorporation of a company with only one member through s 9(b) of the CA 2016. The provisions of the CA 2016 must be read harmoniously and do not discriminate between companies with a single member and those with more than one. Although s 311(3)(a) uses the word 'members', in interpreting the section, the court was entitled to resort to s 4(3) of the Interpretation Acts 1948 and 1967 which provide that words and expressions in the plural include the singular. On the facts of the case, the defendant held more than 10% shares in the plaintiff. As such, there was no breach of s 311(3)(a) of the CA 2016. The third EGM notice was not invalid, null or void (see paras 19–21 & 32).

(2) The court accepted the defendant's postulation that s 201 of the CA 2016 did not say such consent and declaration must be delivered together with the requisition notice. Exhibit 'HBT4' dated 2 June 2021 made plain that the consent and declaration of the directors to be appointed had been obtained. The court was of the view that there was no breach of s 201 of the CA 2016 (see para 33).

(3) Under s 239 of the CA 2016, removal of the company secretary was within the remit of the board. However, the court was of the view that the proposed resolution may be excluded by not putting it to a vote during the EGM. The inclusion of the proposed resolution did not ipso facto infect and invalidate the whole of the third EGM Notice (see para 34).

(4) The court found no merits in the plaintiff's contention as under s 312(1) of the CA 2016, the directors were obligated to call for the EGM within 14 days from the date of the requisition and hold the meeting on a date not more than 28 days after the date of the notice to convene the meeting. The court agreed with the defendant's counsel that the directors had the liberty to fix any date and venue they deemed fit, so long as they acted within the confines of s 312(1). In any case, no reasons were given by the directors as to the non-suitability of the date or venue; neither was there any evidence that the plaintiff or the directors would suffer any prejudice simply because the third EGM notice fixed a date and venue for the EGM (see para 35).

(5) To avoid any contravention of s 196 of the CA 2016, there was nothing to prevent the resolutions on appointment of new directors to be voted upon first, before the resolutions to remove the existing directors were tabled and voted upon. Further, the chairman of the EGM could decide not to put any resolution to a vote if the result would be to reduce the number of Malaysian resident directors to below two. In other words, the removal and appointment of directors need not follow the sequence set out in the third EGM notice (see para 37).

(6) The court was of the view that the requisition for an EGM vide the third EGM notice made by the defendant was a valid requisition. Pursuant to the peremptory wording of s 312(1) of the CA 2016, the directors of the plaintiff had a statutory obligation to convene the EGM notwithstanding that the defendant was seeking to remove all of them. Instead, the directors refused to convene the EGM and relied on their wrong to frustrate the defendant's inviolate right as a shareholder to reconstitute the board of the company. The right of a shareholder to convene a meeting was an unfettered right, jealously guarded and given effect by the courts in a plethora of cases. After careful consideration of the facts of the case, the court was of the view that it was inequitable to grant the declarations sought for by the plaintiff (see paras 39–41 & 45).

[Bahasa Malaysia summary

Plaintif adalah syarikat tersenarai awam, telah tersenarai di papan utama Bursa Malaysia Securities Bhd ('Bursa Malaysia'). Pada 31 Mei 2021, setiausaha syarikat plaintif menerima notis mesyuarat agung luar biasa ('EGM') ('notis EGM ketiga') menurut s 311(3)(a) Akta Syarikat 2016 ('AS 2016'), meminta EGM diadakan pada 29 Jun 2021 untuk memecat pengarah semasa dan melantik pengarah baru. Plaintif mengemukakan saman pemula ('OS') melalui lampiran 1 dan memohon, antara lain, deklarasi bagi membatalkan notis EGM ketiga dan membatalkan pengadaan EGM tersebut. Hujah pihak plaintif untuk membatalkan notis tersebut adalah bahawa: (a) notis EGM ketiga hanya dibawa oleh seorang anggota syarikat sahaja sementara s 311(3)(a) AS 2016 dengan jelas menggunakan perkataan 'anggota-anggota'; (b) notis EGM ketiga tidak mengandungi atau melampirkan persetujuan bertulis pengarah baru yang diusulkan; (c) defendan tidak mempunyai kuasa untuk memohon pemecatan setiausaha syarikat kerana kuasa terletak terletak pada lembaga pengarah; (d) s 311(2) AS 2016 dibaca bersama s 312(1) AS 2016 tidak membenarkan defendan menetapkan tarikh dan tempat mesyuarat agung; dan (e) pemecatan kesemua pengarah plaintif melanggar AS 2016 di mana syarikat tersenarai awam haruslah mempunyai minimum dua pengarah. Satu-satunya isu untuk ditentukan oleh mahkamah berpusat pada s 311(3)(a) AS 2016 dan sama ada seorang pemegang saham tunggal, yang memegang sekurang-kurangnya 10% pegangan saham dalam syarikat plaintif dapat secara sah meminta EGM.

Diputuskan, menolak saman pemula dengan kos.

(1) Pendapat plaintif bahawa dengan menggunakan perkataan 'anggota-anggota'; kemajmukan adalah niat Parlimen berkenaan dengan s 311(3)(a) AS 2016 telah ditolak oleh mahkamah. Salah satu perubahan penting dalam AS 2016 membenarkan penubuhan syarikat dengan hanya seorang anggota melalui s 9(b) AS 2016. Peruntukan AS 2016 mesti dibaca secara harmoni dan tidak membezakan antara syarikat

dengan satu anggota dan mereka yang mempunyai lebih daripada satu. Walaupun s 311(3)(a) menggunakan perkataan 'anggota', dalam menafsirkan seksyen tersebut, mahkamah berhak menggunakan s 4(3) Akta Tafsiran 1948 dan 1967 yang memperuntukkan bahawa kata-kata dan ungkapan dalam bentuk majmuk termasuk tunggal. Mengenai fakta kes, defendan memegang lebih daripada 10% saham dalam plaintif. Oleh itu, tidak ada pelanggaran s 311(3)(a) AS 2016. Notis EGM ketiga sahih, tidak terbatal atau sah (lihat perenggan 19–21 & 32).

(2) Mahkamah menerima tanggapan defendan bahawa s 201 AS 2016 tidak mengatakan persetujuan dan perisytiharan tersebut harus disampaikan bersama-sama dengan notis permintaan. Ekshibit 'HBT4' bertarikh 2 Jun 2021 menjelaskan bahawa persetujuan dan pengisytiharan pengarah yang akan dilantik telah diperoleh. Mahkamah berpendapat bahawa tidak ada pelanggaran s 201 AS 2016 (lihat perenggan 33).

(3) Di bawah s 239 AS 2016, pemecatan setiausaha syarikat adalah di bawah tanggungjawab lembaga. Namun, mahkamah berpendapat bahawa resolusi yang diusulkan dapat dikecualikan dengan tidak membenarkan undiannya semasa EGM. Kemasukan resolusi yang diusulkan tidak secara ipso facto memberikan kesan dan membatalkan keseluruhan notis EGM ketiga (lihat perenggan 34).

(4) Mahkamah mendapati tidak ada merit dalam pendapat plaintif kerana di bawah s 312(1) AS 2016, pengarah mempunyai tanggungjawab untuk meminta EGM dalam tempoh 14 hari dari tarikh permintaan dan mengadakan mesyuarat pada tarikh yang tidak lebih daripada 28 hari selepas notis pemberitahuan untuk mengadakan mesyuarat. Mahkamah bersetuju dengan peguam defendan bahawa pengarah mempunyai kebebasan untuk menetapkan sebarang tarikh dan tempat yang mereka anggap sesuai, selagi mereka bertindak dalam lingkup s 312(1). Walau apa pun, tiada alasan yang diberikan oleh pengarah mengenai ketidaksesuaian tarikh atau tempat; tidak ada keterangan bahawa plaintif atau pengarah akan diprejudiskan hanya kerana notis EGM ketiga menetapkan tarikh dan tempat untuk EGM (lihat perenggan 35).

(5) Bagi mengelakkan sebarang pelanggaran s 196 AS 2016, tidak ada halangan usul pelantikan pengarah baru untuk diundi terlebih dahulu, sebelum resolusi untuk memecat pengarah yang ada dibentangkan dan diundi. Selanjutnya, pengerusi EGM dapat memutuskan untuk tidak membenarkan usul untuk mengundi sekiranya keputusan tersebut adalah untuk mengurangkan jumlah pengarah permastautin Malaysia menjadi kurang dari dua. Dengan kata lain, pemecatan dan pelantikan pengarah tidak perlu mengikut urutan yang dinyatakan dalam notis EGM ketiga (lihat perenggan 37).

(6) Mahkamah berpendapat bahawa permintaan EGM melalui notis EGM

ketiga yang dibuat oleh defendan adalah permintaan yang sah. Mengikut kata-kata wajib perenggan s 312(1) AS 2016, pengarah plaintif mempunyai kewajiban undang-undang untuk mengadakan EGM walaupun defendan memohon untuk memecat kesemuanya. Sebaliknya, pengarah menolak untuk mengadakan EGM dan bergantungan pada kesalahan mereka untuk menafikan hak defendan sebagai pemegang saham untuk menyusun semula lembaga syarikat. Hak pemegang saham untuk mengadakan mesyuarat adalah hak yang tidak terikat, dikawal dengan teliti dan dikuatkuasakan oleh mahkamah dalam sebilangan besar kes. Setelah mempertimbangkan fakta kes dengan teliti, mahkamah berpendapat bahawa tidak adil untuk membenarkan deklarasi yang dimohon oleh plaintif (lihat perenggan 39–41 & 45).]

Cases referred to

Canopee Investment Pte Ltd & Ors v Landmarks Holdings Bhd & Ors [1989] 2 MLJ 469, HC (refd)

Dato' Abdul Rahman Dato' Mohammed Hashim & Ors v Mass Media Interactive Sdn Bhd & Ors [2011] 1 CLJ 533, HC (refd)

Golden Plus Holdings Bhd v Teo Kim Hui & Ors [2021] 7 MLJ 852, HC (refd)

Granasia Corporation Berhad & Others v Choong Wye Lin (P) & Others [2008] MLJU 259; [2008] 4 CLJ 893], HC (refd)

HLB Nominees (Tempatan) Sdn Bhd v SJA Bhd & Anor and another appeal [2005] 1 CLJ 23, CA (refd)

Koo Shing Sun v Hung Wing San, Tony & Anor [2012] HKCU 1959 (refd)

Kwan Hung Cheong & Anor v Zung Zang Trading Sdn Bhd [2018] 4 MLJ 773; [2018] 10 CLJ 517, CA (folld)

S Varadarajan v Venkateswara Solvent Extraction 1994 80 CompCas 693 Mad, HC (refd)

South Norseman Gold Mines No Liability v MacDonald [1937] SASR 53 (refd)

Zung Zang Trading Sdn Bhd v Kwan Hung Cheong & Anor [2021] 4 MLJ 86, FC (folld)

Legislation referred to

Companies Act 1934 [AU] s 133

Companies Act 1965 (repealed by Companies Act 2016) ss 144, 145

Companies Act 2016 ss 2, 9(b), 100, 144, 144(1), 145, 169, 196, 201, 239, 310, 310(b), 311, 311(1), (2), (3), (3)(a), (5), 312, 312(1), (2), 313, 313(1), 355

Interpretation Acts 1948 and 1967 s 4(3)

Rules of Court 2012 O 29 r 1(2A)

Securities Industry (Central Depositories) Act 1991 s 2

Premjit Singh (Sri Lachman Kumar and Remyzen bin Moksin with him) (Prem & Assoc) for the plaintiff.

Muhammad Azwar bin Ab Manab (Muhammad Azrul Haziq bin Khirullah and

Lawrence TH Lee with him) (Azwar & Partners) for the defendant.

Liza Chan JC:

INTRODUCTION

[1] Enclosure 1 is an originating summons ('OS') filed by the plaintiff on 2 June 2021 for, inter alia:

(a) a declaration that the notice of extraordinary general meeting issued under s 311 of the Companies Act 2016 ('the CA 2016') dated 31 May 2021 by the defendant ('the third EGM notice') is invalid, null and void;

(b) an order that the convening of the extraordinary general meeting of shareholders (EGM) on 29 June 2021 by the defendant ('the notice') is invalid, null and void;

(c) an order that the EGM on 29 June 2021 called by the defendant be stayed until the disposal of this action;

(d) a declaration that all outcomes, notices, measures and follow-up and/or follow-up actions that have been and/or will be taken by the defendant, whether through herself and/or her agents, servants, representatives or any party in respect of the notice is invalid, null and void;

(e) an order that the defendant be required to indemnify the plaintiff against any and/or all liabilities, costs and damages in respect of the said notice given by the defendant to the plaintiff;

(f) general damages to be assessed by this honorable court; and

(g) costs of this action be paid by the defendant to the plaintiff forthwith on a full indemnity basis.

[2] Simultaneous with the filing of the OS, the plaintiff filed an ex parte injunction application (encl 3) to restrain the defendant, either by herself and/or her agents, servants, representatives or any party from taking any further step and action and/or follow-up for the purpose of execution of the third EGM notice issued under s 311 of the CA 2016 by the defendant until the disposal of this action.

[3] As the ex parte injunction application did not comply with O 29 r 1(2A) of the Rules of Court 2012, it was instead ordered to be heard interpartes.

[4] The grounds in support of the injunction application and the final declaratory orders in the OS are identical. As such, the parties agreed that disposal of the OS will render encl 3 (amended to encl 10) academic and on the

defendant's undertaking through counsel not to take any further steps in respect of the third EGM notice until disposal of the OS.

[5] I had dismissed the OS on 16 July 2021. The plaintiff has filed an appeal against my decision. These are the grounds for my decision.

BACKGROUND AND PARTIES

[6] The plaintiff (interchangeably 'the company') at time of the filing of the OS is a public listed company, listed on the main board of Bursa Malaysia Securities Bhd ('Bursa Malaysia').

[7] The defendant through her solicitors on 25 May 2021 and 28 May 2021 issued EGM Notice 1 and EGM Notice 2 respectively to call for an EGM to remove the current directors and to appoint new directors. There is no dispute that both these notices were withdrawn.

[8] On 31 May 2021, the plaintiff's company secretary received the third EGM notice pursuant to s 311(3)(a) of the CA 2016 from the defendant, requesting to be held an EGM on 29 June 2021 to:

(a) remove the following directors:

(i) Y Bhg Dato' Dr Chin Yew Sin (JP);

(ii) Ang Eng Hooi;

(iii) YB Dato' Sri Dr Md Kamal bin Bilal;

(iv) Lim Kuang Hee ;

(v) Teh Beng Soon; and

(vi) any such persons as might have been appointed by the Board of Directors as director to fill the vacancy on the Board of Directors from the period between date of the notice of this Extraordinary General Meeting until the initiation/holding of the Extraordinary General Meeting of the company.

(b) removal of the company secretaries, P'ng Chiew Keem (MAICSA 70226443) and Tan Tong Lang (MAICSA 7045482) and appointment of Agnes Wong Ling Lee (MIA14927) of Syarikat Ong & Co as the company secretary in place of P'ng Chiew Keem and Tan Tong Lang; and

(c) appointment of Norizam bin Tukiman; Mohd Johari Edrus and Muhammad Arif bin Tukiman as Directors of the company.

[9] The third EGM notice made clear that if the EGM is not called, then

the defendant will proceed to convene such EGM for the purpose of considering and if thought fit, to pass the aforesaid resolutions. A

[10] As at date of giving the third EGM notice, the defendant is a shareholder of 49,824,200 shares equivalent to 15.77% of the shares in the plaintiff in CDS Account No 087–006–056772221. B

[11] The directors of the company refused to convene the EGM to consider the aforesaid resolutions and in an announcement dated 2 June 2021 to Bursa Malaysia, took the position that the third EGM notice was invalid pursuant to s 311(3)(a) of the CA 2016, in that any requisition for a meeting of members would have to be from more than one member and that pursuant to s 311(5) of the CA 2016, a resolution may properly be moved at a meeting unless the resolution: (a) if passed, would be ineffective by reason of inconsistency with any written law or the Constitution; (b) is defamatory of any persons; (c) is frivolous or vexatious; or (d) if passed, would not be in the best interest of the company. C D

[12] The sole issue for determination by this court centres on s 311(3)(a) of the CA 2016 whether a single shareholder, holding at least 10% of the shareholding in the company can validly requisition an EGM. E

THE PLAINTIFF'S ARGUMENTS

[13] The plaintiff in its affidavit in supoprt of the OS and in its submission contended that the third EGM notice was invalid as: F

(a) the third EGM notice was brought by only a singlemember of the company; s 311(3)(a) of the CA 2016 expressly uses the word 'members'; plurality must have been the intention of Parliament in regards to s 311, because as compared to the wordings of s 310(b) of the CA 2016, the words 'any member' is used; G

(b) the third EGM notice did not contain or attach any written consent of the proposed new directors in breach of s 201 of the CA 2016; H

(c) the defendant does not have any power to requisition for the removal of the company secretary as such power resides with the Board under s 239 of the CA 2016;

(d) s 311(2) of the CA 2016 read with s 312(1) of the CA 2016 does not allow the defendant to fix the date and venue of the the EGM; I

(e) the removal of all of the plaintiff's directors has breached s 196 of the CA 2016 which provides that a public listed company must have a minimum of two directors; and

(f) the procedure for calling such a meeting should be adhered to strictly by the defendant — *HLB Nominees (Tempatan) Sdn Bhd v SJA Bhd & Anor and another appeal* [2005] 1 CLJ 23 (CA).

THE DEFENDANT'S ARGUMENTS

[14] In opposing the OS, the defendant contended:

(a) the term 'members' in s 311 of the CA 2016 include the singular — s 4(3) of the Interpretation Acts 1948 and 1967 and *Kwan Hung Cheong & Anor v Zung Zang Trading Sdn Bhd* [2018] 4 MLJ 773; [2018] 10 CLJ 517 (CA);

(b) although s 201 of the CA 2016 states a person is not to be appointed as director unless he has consented in writing and make a declaration he is not disqualified, the said section construed in its ordinary sense, does not say such consent and declaration must be delivered together with the requisition notice and such consent and declaration may be given at any time for the appointment to be effective, and in this case, before the resolution is voted upon; exh 'HBT4' dated 2 June 2021 clearly shows the consent and declaration of the directors to be appointed;

(c) as for removal of the secretary, an invalid resolution does not invalidate the third EGM notice and may be removed/changed during the EGM itself;

(d) as for the minimum number of directors in a public listed company, there is the appointment of three new directors which will comply with s 196 of the CA 2016; there was nothing stated in the third EGM notice that removal of directors must be voted on first , or in the sequence as set out in the notice;

(e) as for the third EGM notice fixing a date and venue for the EGM, it does not affect its validity as the directors are duty bound under s 312 to act and have the liberty to fix another date and venue; neither did the Directors say the date and venue were not suitable; and

(f) there is no justifiable ground for the directors not to convene the EGM by 13 June 2021 as mandated under s 312 of the CA 2016; the reasons proferred by the directors are inter alia tactical and fear of losing their position on the Board.

THE LAW AND THIS COURT'S FINDINGS

[15] I produce s 311(1), (2) and (3) of CA 2016 for ease of reference and for its scope:

311 Power to require directors to convene meetings of members.

(1) The members of a company may require the directors to convene a meeting of members of the company.

(2) A requisition under subsection (1) —

(a) shall be in hard copy or electronic form;

(b) shall state the general nature of the business to be dealt with at the meeting;

(c) may include the text of a resolution that may properly be moved and its intended to be moved at the meeting; and (d)shall be signed or authenticated by the person making the requisition.

(3) The directors shall call for a meeting of members once the company has received requisition to do so from —

(a) members representing at least ten per centum of the paid up capital of the company carrying the right of voting at meetings of members of the company, excluding any paid up capital held as treasury shares; or

(b) in the case of a company not having a share capital, members who represent at least five per centum of the total voting rights of all members having a right of voting at meetings of members.

[16] Section 312(1) and (2) of the CA 2016 provide as follows:

312 Directors' duty to call meetings required by members.

(1) In relation to section 311, the directors shall —

(a) call for the meeting within fourteen days from the date of the requisition; and

(b) hold the meeting on a date not more than twenty-eight days after the date of the notice to convene the meeting.

(2) If the requests received by the company identify a resolution intended to be moved at the meeting, the notice of the meeting shall include the text of the resolution.

[17] If the directors fail to convene the requisitioned meeting, the member can convene the meeting under s 313(1) of the CA 2016 which provides as follows:

313 Power of members to convene meeting of members at company's expense.

(1) If the directors —

(a) are required under section 311 to call a meeting of members; and

(b) do not do so in accordance with section 312,

The members who requisitioned the meeting, or any of the members representing more than one half of the total voting rights of all of the members who requisitioned the meeting, may call for a meeting of members.

A ...

Is the third EGM notice a valid notice under s 311(3)(a) of the CA 2016

B **[18]** A comparison of ss 144 and 145 of the CA 1965 and ss 310 and 311 of the CA 2016 are produced to better appreciate the differences. This will become relevant when considering the cases decided under s 144, the predecessor of s 311 of the CA 2016 dealing with the requisition of members meeting and s 145 of the CA 1965:

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COMPANIES ACT 1965	COMPANIES ACT 2016
Section 144. Convening of extraordinary general meeting on requisition.	Section 311. Power to require directors to convene meetings of members
(1) The directors of a company, notwithstanding anything in its articles, shall on the requisition of members holding at the date of the deposit of the requisition not less than one-tenth of such of the paid-up capital as at the date of the deposit carries the right of voting at general meetings or, in the case of a company not having a share capital, of members representing not less than one-tenth of the total voting rights of all members having at that date a right to vote at general meetings, forthwith proceed duly to convene an extraordinary general meeting of the company to be held as soon as practicable but in any case not later than two months after the receipt by the company of the requisition.	(1) the Members of a company may require the directors to convene a meeting of members of the company. ... (3) The Directors shall call for a meeting of members once the company has received requisition to do so from — (a) members representing at least ten per centum of the paid up capital of the company carrying the right of voting at meetings of members of the company, excluding any paid up capital held as treasury shares; ...
Section 145 Calling of meetings.	Section 310 Power to Convene meetings of members

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(1) Two or more members holding not less than one-tenth of the issued share capital or, if the company has not a share capital, not less than five per centum in number of the members of the company or such lesser number as is provided by the articles may call a meeting of the company.	A Meeting of members may be convened by — (a) the Board; or (b) any member holding at least ten percentum of the issued share capital of a company or a lower percentage as specified in the constitution or a lower percentage as specified in the constitution or if the company has no share capital by at least five per centum in the number of the members.

[19] I reject the contention of the plaintiff that by the use of the word 'members'; plurality must have been the intention of Parliament in regards to s 311(3)(a) of the CA 2016 .

[20] Firstly, one of the key changes in the CA 2016 allows the incorporation of a company with only one member through s 9(b) which stipulates that 'A company shall have one or more members ...'. The provisions of the CA 2016 must be read harmoniously and do not discriminate between companies with a single member and those with more than one. If the plaintiff is right in its assertion, it will mean s 311(3)(a) do not apply to companies with a single shareholder.

[21] Secondly, although s 311(3)(a) uses the word 'member*s*' , in interpreting the section, the court is entitled to resort to s 4(3) of the Interpretation Acts 1948 and 1967 ('Act 388') which reads as follows:

> 4(3) Words and expressions in the singular include the plural, and words and expression in the plural include the singular.

[22] I am fortified in my view by the Court of Appeal decision in *Kwan Hung Cheong & Anor v Zung Zang Trading Sdn Bhd* [2018] 4 MLJ 773; [2018] 10 CLJ 517 which held:

> [41] Going by s 4(3) of Act 388, words in the singular include the plural, and vice versa. We are therefore of the opinion that the words 'members' and 'requisitionists' in s 144 of the CA 1965 may be construed to refer to 'member' and 'requisitionist' in the singular in that section, as the case maybe. Thus, it cannot be held against the respondent if there is only one requisitionist, and not more than one requisitionist, who made the requisition for the EGM ...

[23] The Court of Appeal's interpretation was upheld by the Federal Court in *Zung Zang Trading Sdn Bhd v Kwan Hung Cheong & Anor* [2021] 4 MLJ 86:

A [30] We shall at the outset state our view on this point. Having regard to the terms of s 144(1) of the Companies Act, *KCHSB being the sole and only owner of Zung Zang and therefore its member holding 'not less than one-tenth of the paid up capital' of Zung Zang, it is clear that KCHSB through PW1 as its corporate representative was vested with the authority to requisition the second EGM of Zung Zang*. (Emphasis added.)

B

[24] Of significance to note is that KCHSB is the only 'single' member or shareholder in Zung Zang Trading Sdn Bhd.

C **[25]** In *Australia* in the case of *South Norseman Gold Mines No Liability v MacDonald* [1937] SASR 53, Reed AJ at 57 referring to s 133 of the Australian Companies Act 1934 which is in pari materia with our s 144(1) held as follows:

> To put it in another way — it is a condition which must exist before the members of the Company, or any of them, can get the whole of themembers together, and
D consequently discharge business which perhaps the directors are not ready or willing to bring up for discussion. If that is the true view, then the real reason of subsec 1 is to prevent one individual shareholder, holding perhaps a small number of shares, from setting in motion the machinery for getting a general meeting called; *but once a number of shareholders, or even one shareholder, holding not less than one-tenth of the*
E *paid-up capital desires a meeting to be called, they can require the directors by requisition to call it.*

[26] In *Granasia Corporation Berhad & Others v Choong Wye Lin (P) & Others* [2008] MLJU 259; [2008] 4 CLJ 893], the High Court pronounced
F that a single member was competent to requisition a meeting despite the language of s 144 of the 1965 Act and relied on the decision in *South Norseman Gold Mines*, which was approved and followed in *Canopee Investment Pte Ltd & Ors v Landmarks Holdings Bhd & Ors* [1989] 2 MLJ 469.

G **[27]** Likewise in *Golden Plus Holdings Bhd v Teo Kim Hui & Ors* [2021] 7 MLJ 852, the court was of the view in construing s 310(b) of the CA 2016, that s 4(3) of Act 388 would allow an interpretation of the term 'member' to include 'members'.

H **[28]** Counsel for the defendant also pointed out that:

(a) the position of law in *India* is that:

(i) 'members' shall include a singular member in respect of requisition of members' meeting. The governing provision is in s 169 of the
I Companies Act 1965 (which was substituted by s 100 of the Companies Act 2016). Section 169 of Companies Act 1965 provide as follows:

> 169. Calling of extraordinary general meeting on requisition.
>
> (1) The Board of directors of a company shall, on the requisition of *such*

> *number of members* of the company as is specified in subsection (4), forthwith proceed duly to call an extraordinary general meeting of thecompany.

(ii) the Indian High Court in the case of *S Varadarajan v Venkateswara Solvent Extraction* 1994 80 CompCas 693 Mad held as follows:

> 15. A shareholder of a company possessing the numerical strength as required by Act has the right to requisition an extraordinary general meeting. Such a shareholder cannot be restrained by injunction from calling the meeting and he is not bound to disclose the reasons for the resolutions proposed at the meeting. Nor are the reasons for the resolutions subject to judicial review. *Though section 169 uses the expression 'such number of member of the company' in the plural, yet the requirements of the provisions would be satisfied even if one member holding the requisite number of shares or voting rights makes the requisition. It is also well settled that words in the plural include the singular.*

(b) in *Hong Kong*, the High Court in *Koo Shing Sun v Hung Wing San, Tony & Anor* [2012] HKCU 1959 held as follows:

> So far as the use of 'members' is concerned this provides no impediment as section 7 of the Interpretation and General Clauses Ordinance, Cap 1, provides that 'Words and expressions in the singular include the plural andwords and expressions in the plural include the singular.' In any event even if section 7 did not allow 'members' to be read in the singular I would read it as simply infelicitous drafting rather than as rendering the Regulation meaningless and thus otiose.

[29] As such, with respect, the High Court decision in *Dato' Abdul Rahman Dato' Mohammed Hashim & Ors v Mass Media Interactive Sdn Bhd & Ors* [2011] 1 CLJ 533 cited by the plaintiff dealing with s 145 of the CA 1965 requiring two members to request for an EGM is not followed as going against the grain of authorities in other jurisdictions; additionally, this court is bound by the doctrine of stare decisis to follow the interpretation of the Court of Appeal in *Kwan Hung Cheong & Anor v Zung Zang Trading Sdn Bhd* and the Federal Court in *Zung Zang Trading Sdn Bhd v Kwan Hung Cheong & Anor.* Indeed, fidelity to the doctrine of stare decisis is fundamental to the rule of law.

[30] Thirdly, s 2 of the CA 2016 defines the word 'member' as:

(a) in the case of a company limited by shares, a person whose name is entered in the register of members as the holder for the time being of one or more shares in the company; or

(b) in the case of a company limited by guarantee, a person whose name is entered in the register of members;

[31] For a public listed company, not only does s 2 of the CA 2016 apply, but the provisions in the Securities Industry (Central Depositories) Act 1991 ('the SICDA') apply. Section 2 of the SICDA defines 'depositor' as a holder of a securities account.

[32] It is not disputed by the plaintiff that by exh HBT1, the defendant holds more than 10% shares in the Company. As such, in my utmost respectful view, there is no breach of s 311(3)(a) of the CA 2016. The third EGM notice is not invalid, null or void.

Is the third EGM notice in breach of s 201 of the CA 2016 as it did attach the written consent and declaration of the proposed new directors?

[33] I accept the defendant's postulation that s 201 of the CA 2016 does not say such consent and declaration must be delivered together with the requisition notice. Exhibit 'HBT4' dated 2 June 2021 made plain the consent and declaration of the directors to be appointed have been obtained. I am of the view that there is no breach of s 201 of the CA 2016.

Whether the defendant's requisition for the removal of the company secretary invalidates the third EGM notice

[34] It appears plain that under s 239 of the CA 2016, removal of the company secretary is within the remit of the Board. However it is my respectful view that this proposed resolution may be excluded by not putting it to a vote during the EGM. The inclusion of this proposed resolution does not ipso facto infect and invalidate the whole of the third EGM notice.

Whether the third EGM notice is invalid as s 311(2) of the CA 2016 read with s 312(1) of the CA 2016 does not allow the defendant to fix the date and venue of the the EGM

[35] I find no merits in the plaintiff's contention in this regard as under s 312(1), the directors are obligated to call for the EGM within 14 days from from the date of the requisition, and hold the meeting on a date not more than 28 days after the date of the notice to convene the meeting. I am inclined to agree witht he defendant's counsel that the directors have the liberty to fix any date and venue they deem fit, so long as they act within the confines of s 312(1). In any case, no reasons were given by the directors as to the non-suitability of the date or venue; neither is there any evidence that the company or the directors will suffer any prejudice simply because the third EGM notice fixed a date and venue for the EGM.

[36] Clearly, by rushing to file the OS and injunction application on 2 June 2021, the Directors have made it amply clear that they refused to convene the EGM.

Whether the third EGM notice is invalid as the removal of all of the plaintiff's directors has breached s 196 of the CA 2016 which provides that a public listed company must have a minimum of two directors

[37] I find this ground posited by the plaintiff a non-starter. I agree with counsel for the defendant that to avoid any contravention of s 196, there is nothing to prevent the resolutions on appointment of three new directors to be voted upon first, before the resolutions to remove the existing directors are tabled and voted upon. Further, the chairman of the EGM can decide not to put any resolution to a vote if the result will be to reduce the number of Malaysian resident directors to below two. In other words, the removal and appointment of directors need not follow the sequence set out in the third EGM notice.

The third EGM notice does not adhere strictly to the procedure for calling such a meeting?

[38] On this ground, the plaintiff had relied heavily on the Court of Appeal in *HLB Nominees (Tempatan) Sdn Bhd v SJA Bhd & Anor and another appeal* [2005] 1 CLJ 23 which held that where the purpose of the EGM was to remove some of the existing directors and in their place to elect the directors of the defendants' choice, a proper and valid notice of such a meeting should be issued because it affected the rights of those directors who were duly elected at a proper and valid annual general meeting of the company concerned. As such the process and procedure for calling such a meeting should be adhered to strictly. Any defect in the process or procedure thereof is not curable under s 355 of the Act. The Court of Appeal also held that the discretionary power under s 355 of the Act is not unfettered. It must be exercised judiciously and the justice of the case should be considered seriously.

[39] On the facts of this case, I am unable to see how any of the trangressions asserted by the plaintiff has infected the third EGM notice. I find the plaintiff's contentions untenable. I am of the view that the requisition for an EGM vide the third EGM notice made by the defendant is a valid requisition.

[40] Pursuant to the peremptory wording of s 312(1) of the CA 2016, the directors of the company have a statutory obligation to convene the EGM notwithstanding the defendant is seeking to remove all of them. Instead, the

directors refuse to convene the EGM and rely on their wrong to frustrate the defendant's inviolate right as a shareholder to reconstitute the Board of the company.

[41] The right of a shareholder to convene a meeting is an unfettered right, jealously guarded and given effect by the courts in a plethora of cases. Suffice for me to just cite a recent case.

[42] In *Golden Plus Holdings Bhd v Teo Kim Hui & Ors,* Ahmad Fairuz J reiterated the position as follows:

> [28] Secondly, the right to convene a meeting must be unfettered as it is equated with the right of a shareholder to vote. The right to vote is sacrosanct to a member and cannot be dispossessed (see *Seacera Group Berhad v Dato' Tan Wei Lian & Ors* [2019] MLJU 470; [2019] 1 LNS 762]). This court is also guided by the Court of Appeal decision in *Indian Corridor Sdn Bhd & Anor v Golden Plus Holdings Bhd* [2008] 3 MLJ 653 where the right of shareholders to convene a meeting was described as a valuable right.
>
> [29] This court is further fortified in its view when the 2016 Act introduces a new provision which spells out the powers attached to shares. This is provided in s 71 where it reads as:
>
> 71 Rights and powers attached to shares
>
> (1) A share in a company, other than preference shares, confers on the holder:
>
> (a) the right to attend, participate and speak at a meeting;
>
> (b) the right to vote on a show of hands on any resolution of the company;
>
> (c) the right to one vote for each share on a poll on any resolution of the company;
>
> (d) the right to an equal share in the distribution of the surplus assets of the company; or
>
> (e) the right to an equal share in dividends authorized by the Board.
>
> (3) Notwithstanding paragraph (1)(e), the right to dividends as specified therein may be negated, altered or added to by the constitution of the company or in accordance with the terms on which the share is issued.

[43] The defendant having requisitioned the directors to convene the meeting under s 311 of the CA 2016, but the directors refused to do so, then the defendant pursuant to s 313 of the CA 2016 may convene the EGM herself.

[44] A declaratory order is a form of equitable remedy. After careful consideration of the facts of this case, it is my view that it is inequitable to grant the declarations sought for by the plaintiff.

[45] I have considered carefully the plaintiff's submissions. For the reasons I have given above, I think I can be absolved from blame if I did not delve in detail and address here each and every single argument and case authority submitted by the plaintiff as I find it strictly unnecessary in arriving at my decision and to avoid a lenghty judgment.

[46] Accordingly, the OS is dismissed with costs.

[47] With the dismissal of the OS, encl 10 was rendered academic and struck off with no order as to costs.

Originating summons dismissed with costs.

Reported by K Selvaraju